

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
) CG Docket No. 02-278
Petition of Merck & Company, Inc.)
for Declaratory Ruling to Clarify Scope and/or) CG Docket No. 05-338
Statutory Basis for Rule 64.1200(a)(4)(iv))
and/or for Waiver)

PETITION FOR DECLARATORY RULING AND/OR WAIVER

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EXECUTIVE SUMMARY

Pursuant to Section 1.2 of the Federal Communications Commission (“Commission” or “FCC”) rules, Merck & Company, Inc. (“Merck” or “Petitioner”) respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) (the “Rule”) of the Commission’s regulations does not apply to fax advertisements sent with the prior express consent or permission of the recipient (“solicited faxes”). In the alternative, Petitioner respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). At a minimum, the Commission should clarify that solicited faxes sent with effective opt-out notices do not violate the Rule or any other regulation promulgated by the Commission under the TCPA.

If the Commission declines to issue the requested declaratory rulings, Petitioner respectfully requests that, pursuant to Section 1.3 of the FCC’s rules, the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by or on behalf of Merck with the prior express consent or permission of the recipients or their agents.

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INTRODUCTION

Merck & Company, Inc. (“Merck” or “Petitioner”), a pharmaceutical manufacturer, is subject to a putative class action lawsuit based on the sending of solicited faxes that contained an effective opt-out notice. While these solicited faxes harmed no one, the plaintiff in that lawsuit seeks millions of dollars on behalf of the putative class, claiming that Merck has violated Section 64.1200(a)(4)(iv) of the Commission’s rules (the “Rule”) because the opt-out language on the faxes allegedly was not fully compliant with the Rule’s requirements.

47 U.S.C. § 227(b) codifies, in part, the Telephone Consumer Protection Act, as amended (“TCPA”). The plain language and scope of Section 227(b) is expressly limited to unsolicited faxes, which the statute defines to exclude faxes sent with consent. Thus, no regulation adopted under Section 227(b) properly could extend to solicited faxes.

Nevertheless, the Rule contains confusing and inconsistent language regarding opt-out notice requirements, such that its scope and applicability are unclear. This uncertainty has led to legal disputes, numerous petitions filed with the Commission, and confusion regarding application of the Rule’s opt-out notice requirements. Accordingly, consistent with the TCPA’s

text and legislative history, Merck urges the Commission to resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements.

Alternatively, Merck requests that the Commission issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(a)(4)(iv). Such a ruling would clarify the Commission's authority for this Rule section while making clear that solicited faxes sent without the precise opt-out notification language requirements listed in the Rule cannot form the basis of a private action under the TCPA.

Should the Commission decline to issue the declaratory rulings sought above, the Commission at least should clarify that a fax that is transmitted pursuant to the prior express invitation or permission of a fax recipient, and includes an effective opt-out notice, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the TCPA.

Finally, in the absence of any of the declaratory rulings requested above, Merck requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the Rule for any fax transmitted by or on behalf of Merck with consent.

BACKGROUND

Merck is presently defending a lawsuit brought by a serial TCPA-class action plaintiff. *See Kaye v. Merck & Co., Inc.*, 3:10cv1546 (RNC) (D. Conn., filed Sept. 29, 2010).¹ The single fax appended to plaintiff's complaint was addressed to the plaintiff, Roger Kaye, a physician, by name, and invited him to attend an interactive telesymposium on "important clinical information about schizophrenia and bipolar disorder."² At the bottom of the first and

¹ The case technically features two plaintiffs: Roger H. Kaye and Roger H. Kaye, MD PC. Merck refers to the plaintiffs collectively as "Kaye" or "plaintiff."

² Merck denies that the fax at issue constitutes an advertisement under the TCPA.

only page of the fax appeared the following statement: “To be removed from the fax list for this program, please initial here ___ and fax this form back to (207) 288-2307 or call (877) 963-3532.” Kaye does not allege that he received any other faxes or that he attempted to utilize the opt-out mechanism without success.

Merck’s co-defendant, MedLearning, Inc. (“MedLearning”), conducted outreach to physicians who were invited to the telesymposium. MedLearning placed a personal phone call to each invitee. MedLearning conducted a careful process to ensure consent before sending any fax. Notwithstanding this careful consent process, Merck and MedLearning have been subject to a class action lawsuit seeking millions of dollars in damages. Kaye’s primary theory of liability in the case is that the Commission’s Rule requires an extensive opt-out notice on every fax, even where express consent was obtained prior to sending.³ Thus Merck and MedLearning face a lawsuit even though the harm to recipients of the faxes—who Merck contends expressly agreed to receive them—is nonexistent.

The district court in *Kaye* has phased discovery, prioritizing precertification discovery on the issue of whether the subject telesymposia faxes were solicited or unsolicited.⁴ The court has stayed additional discovery or proceedings in the case, pending the completion of the initial round of discovery and/or “the outcome of proceedings before the Federal Communications Commission concerning the Commission’s regulation of solicited faxes under the TCPA.”⁵ Before ordering the partial stay, the court expressed serious concern about the application of the opt-out notice requirements to solicited faxes.⁶

³ Plaintiffs in *Kaye* have also pled a class of alleged recipients of “unsolicited” faxes.

⁴ *Kaye*, 3:10cv1546, Order at 1 (doc. # 114, Jan. 26, 2014); *id.*, Order at 7 (doc. # 126, May 15, 2014) (adhering to Order of Jan. 26, 2014).

⁵ *Id.*, Order at 1 (doc. # 114, Jan. 26, 2014). The Court also stayed those additional proceedings pending the result the certiorari petition in the U.S. Supreme Court in *Nack v. Walburg*, 715 F.3d

ARGUMENT

I. The Commission Should Clarify that Section 64.1200(a)(4)(iv) Does Not Apply to Faxes Sent with the Consent of the Recipient.

The Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited faxes for the following reasons: (i) the Rule and the Commission order implementing the Rule are ambiguous with respect to the provision's scope and applicability; (ii) applying Section 64.1200(4)(iv) to faxes sent with the consent of the recipient would exceed the Commission's authority under the Communications Act; and (iii) interpreting the provision to apply to solicited faxes would raise significant constitutional concerns.

A. Section 64.1200(a)(4)(iv) and the Commission's Implementing Order Are Unclear In Scope and Applicability.

The Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes because the language of the Rule is unclear in its scope, and excluding solicited faxes best comports with Congress's intent to regulate *unsolicited* faxes. The Rule provides, in pertinent part:

No person or entity may: ...

Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless – ...

A facsimile advertisement that is sent to a recipient that has

680 (8th Cir. 2013), *petition for cert. filed* (U.S. Oct. 15, 2013). Since the Court's preliminary Order on January 26, 2014 (subsequently adhered to by Order dated May 15, 2014), the Supreme Court denied certiorari in *Nack*. See *Nack v. Walburg*, No. 13-486, 2014 WL 1124926 (U.S. Mar. 24, 2014).

⁶ *Kaye*, 3:10cv1546, Teleconference of Jan. 21, 2014, Tr. at 9:19-22 ("I think the FCC might very well have exceeded the scope of its authority and arrogated to itself a power to regulate, that [] wasn't conferred on it by Congress.").

provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph a(4)(iii) of this section.⁷

Given the punctuation and varied sentence structure of the rule, the plain text of Section 64.1200(a)(4)(iv) does not make sense as drafted. Because the Rule contains references to both unsolicited faxes and faxes sent with consent, it is impossible to tell whether the Rule is intended to reach solicited as well as unsolicited faxes.⁸

The *JFPA Order* is equally confusing. The Order first explains that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”⁹ Only later, in a paragraph dealing with the issue of faxes sent based on consent received prior to the effective date of the rules, does the Order state that an opt-out notice would be required “to allow consumers to stop unwanted faxes in the future.”¹⁰ A reasonable interpretation of this provision is that, to the extent any opt-out notice requirement was intended by the Commission to apply to faxes sent with consent, it was intended to apply only where that consent was obtained prior to the effective date of the rules. In any event, given these ambiguities and contradictions, there is legitimate uncertainty regarding whether Section 64.1200(a)(4)(iv) applies to solicited faxes.

⁷ 47 C.F.R. § 64.1200(a)(4)(iv).

⁸ Indeed, until recently, the majority of court decisions had concluded that the TCPA and its implementing regulations reached only unsolicited faxes: *See, e.g., Fricko Inc. v. Novi Brs Enters.*, No. 10-10626, 2011 WL 2079704, at *2 (E.D. Mich. May 25, 2011) (“liability exists under the TCPA only if the transmissions were unsolicited”); *Miller v. Painters Supply & Equip. Co.*, 2011 Ohio 3976 ¶¶ 19-21 (Ohio 8th DCA 2011) (“[P]laintiffs seek to put the proverbial cart before the horse [T]he opt-out notice requirements do not come into play unless it is first shown that unsolicited fax advertisements were sent.”) (citing *Nack* with approval); *Fackelman v. Micronix*, 2012 Ohio 5513 ¶¶ 13, 16 (Ohio 8th DCA Nov. 29, 2012) (holding that the Regulation applies only to unsolicited fax advertisements; *see also Clearbrook v. Rooflifters, LLC*, No. 08C3276, 2010 WL 2635781, at *4 (N.D. Ill. June 28, 2010) (“there is little case law to support the theory that a plaintiff can proceed with a TCPA claim when he or she has explicitly consented to the fax advertisement.”)).

⁹ JFPA Order ¶ 42 n.154.

¹⁰ *Id.* at ¶ 48.

The Commission should end this uncertainty and make clear that Section 64.1200(a)(4)(iv) does not apply to fax advertisements that were sent with the prior express consent of the recipient, as that interpretation best accords with the text and history of the TCPA.

The TCPA's opt-out requirements apply only to "unsolicited advertisement[s]," the definition of which expressly excludes any fax advertisement sent with the recipient's "prior express invitation or permission."¹¹ Likewise, the legislative history of the original TCPA enactment makes clear that the purpose of the Act was to address the problem of "*unsolicited*" fax advertisements.¹² And the legislative history of the JFPA is no different, showing that Congress meant only to "[c]reate a limited [EBR] statutory exception to the current prohibition against the faxing of unsolicited advertisements," and for those "unsolicited advertisements," to require "notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements."¹³ There is no indication whatsoever that Congress was concerned about communications between businesses and their consenting customers. It is thus unsurprising that the Commission never provided notice, in its notice of proposed rulemaking or elsewhere, that it was even considering applying any regulations to solicited faxes. Accordingly, the Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes.

¹¹ 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5).

¹² S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 ("The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine.").

¹³ S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 319.

B. Applying Section 64.1200(4)(iv) to Faxes Sent with Consent Would Exceed the Commission’s Authority Under the TCPA.

As discussed above, Section 227(b)(1) makes it unlawful for any person “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*” unless certain requirements are met, including that the sender has an established business relationship with the recipient and the fax displays an opt-out notice meeting the statutory criteria.¹⁴ The TCPA explicitly defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission, in writing or otherwise.*”¹⁵ By its terms, then, the statutory restrictions — including the opt-out-notice requirement — do not apply to any faxes sent *with* the recipient’s prior express invitation or permission.

Supreme Court precedent is clear that agencies may not exercise authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. In *FDA v. Brown & Williamson Tobacco Corp.*,¹⁶ the Supreme Court held that the Food and Drug Administration’s (“FDA”) assertion of jurisdiction over tobacco products was impermissible in light of Congress’s clear intent as expressed in the Food, Drug, and Cosmetics Act (“FDCA”).¹⁷ The Court affirmed that “although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing ‘court, as well as the agency,

¹⁴ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

¹⁵ § 227(a)(5) (emphasis added).

¹⁶ 529 U.S. 120 (2000).

¹⁷ *Id.* at 126.

must give effect to the unambiguously expressed intent of Congress.”¹⁸ “Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”¹⁹

The *Brown & Williamson* Court concluded that the FDCA’s overall regulatory scheme and subsequent tobacco-specific legislation showed Congress’s clear intent to preclude the FDA from regulating tobacco products. “A fundamental precept of the FDCA is that any product regulated by the FDA—but not banned—must be safe for its intended use.”²⁰ Among other problems, the Court ruled that the FDA’s conception of “safety” was implausible because it required reading “any probable benefit to health” to include “the benefit to public health stemming from adult consumers’ continued use of tobacco products, even though the reduction of tobacco use is the *raison d’être* of” the challenged regulations.²¹ To find that the FDA had authority to regulate tobacco products, the Court would have had to adopt an understanding of “safety” that included outcomes that were not safe—what the Court called “an extremely strained understanding of ‘safety’ as it is used throughout the” FDCA.²²

MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994) involved the proper construction of the term “modify” in § 203(b) of the Communications Act of 1934. The Commission contended that, because the Act gave it the discretion to “modify any requirement” imposed under the statute, it therefore possessed the authority to render

¹⁸ *Id.* at 125-26 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

¹⁹ *Id.* at 125 (internal quotations omitted).

²⁰ *Id.* at 142.

²¹ *Id.* at 120.

²² *See id.* at 160.

voluntary the otherwise mandatory requirement that long distance carriers file their rates.²³

The Supreme Court disagreed, finding “not the slightest doubt” that Congress had spoken directly on the question.²⁴

The Court rejected the Commission’s construction of the statute because, among other things, the Commission’s preferred definition of the word “modify” as including “make a basic or important change in,” contradicted contextual indications of the statute, which supported a definition of “modify” that carried a connotation of “increment or limitation.”²⁵ After analyzing how the Commission’s proposed definition contradicted one of the alternative meanings in the same dictionary to which the Commission pointed, the Court observed

When the word “modify” has come to mean both “to change in some respects” and “to change fundamentally” it will in fact mean neither of those things. It will simply mean “to change,” and some adverb will have to be called into service to indicate the great or small degree of the change.²⁶

MCI rejected the Commission’s interpretation of the statute because it went beyond the meaning that the statute could bear.²⁷

Brown & Williamson and *MCI* are instructive to the issue at hand. Both cases employ a common sense interpretation of legislative words. In *Brown & Williamson*, the FDA was not permitted to interpret “safe” to include “unsafe.” Here, the Commission should not have interpreted “unsolicited” to include “solicited.” Relying on the Court’s analysis in *MCI*, if the definition of “unsolicited” includes both “unsolicited” and “solicited,” it will mean neither of those things, and the TCPA will simply proscribe sending any advertisement via facsimile transmission. Congress was mindful of the limitations on regulating free speech and

²³ *Id.* at 225.

²⁴ *Id.* at 228.

²⁵ *Id.* at 225-26.

²⁶ *Id.* at 227.

²⁷ *See id.* at 229, 232, 234.

commercial speech, and privacy concerns, when it passed the TCPA in 1991 and the Junk Fax Prevention Act in 2005, however, and asserted no interest in regulating solicited faxes.²⁸ Accordingly, the Commission did not obtain the authority to regulate solicited faxes when Congress passed a statute regulating unsolicited faxes. Thus, the Rule is invalid to the extent it purports to regulate solicited faxes and is promulgated pursuant to the Commission's authority under Section 227. The Commission should construe the Rule to avoid these problems.

C. Interpreting the Provision to Apply to Solicited Faxes Would Raise Significant Constitutional Concerns.

Imposing an opt-out notice requirement on consensual communications between fax senders and recipients raises serious First Amendment concerns. In addition, assessing potentially massive statutory damages based on alleged technical deficiencies in such notices, under circumstances where the recipient has expressly invited or consented to the fax, raises substantial Due Process concerns. Accordingly, the Rule should be interpreted in a manner to avoid these constitutional problems.

It is unlikely that Congress or the Commission could validly impose extensive opt-out requirements on solicited faxes consistent with the First Amendment. It is well established that in order to burden truthful commercial speech, the government must show

²⁸ The TCPA's legislative history reflects Congress's knowledge that it could not restrict facsimiles that were solicited. *See generally* H.R. Rep. No. 317, H.R. Rep. 102-317, 17 H.R. Rep. 102-317, H.R. Rep. No. 317, 102nd Cong., 1st Sess. 1991, 1991 WL 245201 (Leg. Hist.). Addressing the bill's definitions, House Report 102-317 states that the Committee that crafted the bill "relied on the research of the American Law Division of the Congressional Research Service and the American Civil Liberties Union to conclude that these restrictions [were] justified by the magnitude of the problem *and that such restrictions remain faithful to Supreme Court precedent on protections to be accorded 'commercial speech.'*" H.R. Rep. No. 317, H.R. Rep. 102-317, 17 (emphasis added). The House Report then introduced the bill's two restrictions that addressed fax machines; each restricted only "unsolicited advertisements." *Id.* In particular, the House Report stated that the bill made it unlawful "[t]o use any fax machine, computer or other device to send an *unsolicited* advertisement in violation of future FCC regulations." *Id.* (emphasis added).

its proposed restrictions serve “a substantial interest,” that the restrictions “directly advance the state interest involved,” and that the asserted interest could not “be served as well by a more limited restriction on commercial speech.”²⁹ It is difficult to imagine that the detailed opt-out notice required on *unsolicited* faxes would pass muster under this standard as the most limited means available to address any substantial state interest in regulating *solicited* faxes. Indeed, the Eighth Circuit expressed skepticism over precisely this point in *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). The court noted that, although it previously found “the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech” under the *Central Hudson* test, that analysis and conclusion “would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”³⁰

Faxes sent pursuant to the recipient’s express permission or invitation certainly implicate no state interest in “protecting the public from the cost shifting and interference caused by *unwanted* fax advertisements,”³¹ and the Commission has never identified any other state interest sufficient to justify regulations dictating the contents of consensual communications between commercial entities. Moreover, applying these detailed opt-out requirements to solicited faxes between entities with an established business relationship, particularly under circumstances where the recipient clearly knows how to submit an effective opt-out request, would be sufficiently arbitrary and capricious so as to raise serious due process concerns under the Fifth Amendment. These due process concerns are amplified if the rules governing solicited faxes under such circumstances purportedly were promulgated under

²⁹ *Central Hudson Gas & Elec. Corp. v. Public Servo Comm’n*, 447 U.S. 557, 564 (1980).

³⁰ *Nack*, 715 F.3d 680 at 687 (declining to consider constitutional challenge raised for the first time on appeal).

³¹ *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (2003) (emphasis added).

a statutory authority that could expose fax senders to excessive statutory damages that are radically disproportionate to the *de minimis* actual damages, if any, sustained by recipients.³²

II. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(4)(iv) Is Not 47 U.S.C. § 227(b).

If the Commission declines to interpret Section 64.1200(a)(4)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should at least issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for its rule. Such a ruling would clarify the Commission's authority for Section 64.1200(a)(4)(iv) while making clear to litigants and the courts that solicited faxes sent without the precise opt-out language described in the Commission's rules cannot form the basis of a private action under the TCPA.

The statutory basis for Section 64.1200(a)(4)(iv) is not clear. The Commission cited eleven different statutory provisions in the *JFPA Order* as authority for the multiple amendments it made to Section 64.1200, of which the addition of Section 64.1200(a)(4)(iv) was only one. It is therefore unclear if the Commission relied on its authority under Section 227 (which contains the private right of action provision) in promulgating Section 64.1200(a)(4)(iv), or on one of the other cited provisions. A clarification by the Commission that its basis for promulgating Section 64.1200(a)(4)(iv) was some statutory provision other than Section 227(b) would serve both the Commission's interests and promote the public's interest in fairness and justice.

By making clear that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist businesses by removing the threat

³² See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 70, 71 (1st Cir. 2013) (statutory damage award may violate due process “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” in light

of massive class action lawsuits based solely on communications with consenting consumers. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers. Purported violations of the rule where there is no actual harm could then still be addressed, but would not be subject to multi-millions of dollars in statutory damages claims. By contrast, declining to clarify the basis of Section 64.1200(a)(4)(iv) leaves the courts to guess at the Commission's exercise of jurisdictional authority, complicating the class action suits that are pending around the country and prejudicing litigants who could otherwise have a clear defense.

The Commission therefore should issue a declaratory ruling clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200(a)(4)(iv) of its rules was *not* Section 227(b).

III. The Commission Should Confirm that Substantially Compliant Opt-Out Notices on Solicited Faxes Satisfy Sections 64.1200(a)(4)(iii) and (iv) of the Commission's Rules.

Even if the Commission maintains that it has authority under Section 227(b) to regulate solicited faxes, the Commission should recognize that strict compliance with the notice requirements specified for *unsolicited* faxes is not necessary for faxes expressly invited or consented to by the recipient. When Congress enacted the TCPA, one of its purposes was to establish restrictions on the use of fax machines to transmit “unsolicited advertisements” — that is, “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.”³³ Among other topics, Section 64.1200 of the Commission's rules sets out various requirements for companies that transmit unsolicited faxes, including authority to transmit unsolicited faxes to parties with whom the sender has an

³³ 47 U.S.C. § 227(a)(5).

established business relationship, provided the faxes include an opt-out notice and comply with other requirements.³⁴

The Merck fax at issue in the Connecticut litigation is far different from the unsolicited advertisements Congress sought to restrict. In the first place, the fax at issue is an invitation to a “telesymposium on important clinical information about schizophrenia and bipolar disorder.” Nothing on the face of the fax promotes the commercial availability or quality of any good or service; nor does the fax contain the name of any commercially available product.

Assuming *arguendo* that the fax constituted an “advertisement,” it was sent with permission. MedLearning placed a personal phone call to the office of each fax recipient and carried a careful process to ensure consent before sending any fax. It obtained the fax numbers through those calls. Thus, faxes sent by MedLearning were sent to physicians or other health care professionals’ offices who had provided a fax number — on an individual basis — to Merck or MedLearning. Moreover, each fax contained a clear and conspicuous opt-out notice on the first page with all the necessary information to effect a cost-free opt-out.³⁵ Specifically, the notice stated: “To be removed from the fax list for this program, please initial here __ and fax this form back to (207) 288-2307 or call (877) 963-3532.” Kaye made no allegation that he attempted to use this opt-out process unsuccessfully.

In the absence of the broader declaratory ruling requested herein, the Commission should at least clarify that a fax sent pursuant to the recipient’s prior express invitation or permission and that includes a demonstrably effective opt-out notice complies substantially with 47 C.F.R. § 64.1200, whether or not the opt-out notice is in perfect conformity with the opt-out notice required for *unsolicited* faxes. The Commission itself recognized in the *Junk*

³⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4).

³⁵ See § 64.1200(a)(4)(iii).

Fax Order that it was unnecessary to specify minutiae such as “the font type, size and wording of the notice,” and that doing so “might interfere with fax senders’ ability to design notices that serve their customers.”³⁶ In other contexts, the Commission has recognized that “absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute.”³⁷ Here, the opt-out notice provided in the faxes that are the subject of the Connecticut litigation fulfilled the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms. In this case, requiring “absolute compliance with each component of the rules” — to the extent the opt-out notice rules even require inclusion of the technical details as Kaye alleges — does nothing to protect consumers; instead, such a rigid interpretation exposes legitimate enterprises who acted in good faith to potentially staggering levels of statutory damages based on minor technical faults.

³⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 *et al.*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3801 (2006) (“*Junk Fax Order*”). Cf. *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket No. 11-153 *et al.*, Report and Order, 28 FCC Rcd 7556, 7581 (2013) (declining to require specific wording in text providers’ bounce-back messages informing consumers when text-to-911 is not available, in order to “afford[] covered text providers with the necessary guidance and flexibility to create bounce-back messages that are understood by their particular consumer base”); *Implementation of Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information et al.*, CG Docket No. 96-115 *et al.*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 F.C.C.R. 14860, 14907 (2002) (declining “to mandate specific language” carriers must use when describing consequences of customer’s denying carrier access to CPNI, based on conclusion that rules “provide carriers with sufficient guidance to formulate scripts that inform customers in a neutral manner of significant consequences, without unduly restricting carrier flexibility in delivering the message”).

³⁷ *Provision of Improved Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 5433, 5445 (2005) (internal quotations omitted) (noting a TRS provider may be eligible for TRS Fund reimbursement “if it has substantially complied with Section 64.604”).

IV. Alternatively, Merck Should Be Granted a Waiver.

In the alternative, Merck asks the Commission to waive strict compliance with Sections 64.1200(a)(4)(iii) and (iv) with respect to the faxes in question, pursuant to the Commission's authority under Section 1.3 of its rules.³⁸ The Commission may waive any provision of its rules "for good cause shown"³⁹ when it concludes that a waiver would serve the public interest, considering all relevant factors.⁴⁰ For the reasons discussed above, a waiver with respect to the faxes described herein would serve the public interest by avoiding an abuse of the private right of action created by the TCPA. There is no public interest in subjecting Merck to a lawsuit seeking massive damages on the basis of faxes sent pursuant to the recipients' prior express invitation or permission that included a demonstrably effective opt-out notice on the first page describing a cost-free opt-out mechanism. It serves neither the statutory purposes nor the interests of justice to elevate form over substance by permitting plaintiffs who were not aggrieved — and their attorneys — to tie up courts and judicial resources, potentially for years, based on overwrought complaints about minor technical defects.

In other contexts, the Commission has retroactively waived similarly minor violations of its rules. For instance, the Commission granted a conditional retroactive waiver to a manufacturer of improperly labeled emergency telephones for elevators, in part based on its conclusion that, under the circumstances, no harm to the Public Switched Telephone Network had occurred or was likely to occur, and affected purchasers "have actual knowledge of the manufacturer's identity, and thus have not been harmed by the

³⁸ 47 C.F.R. § 1.3.

³⁹ *Id.*

⁴⁰ See *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16710, 16714 (Network Servs. Div. 2005) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964).)

improper labeling.”⁴¹ Similar logic supports the waiver requested here: the use of an effective opt-out notice on certain fax messages that were expressly invited or permitted caused no harm to Kaye or to the public interest. Given the draconian consequences that could attach to such alleged minor failures under Kaye’s theory of the scope of the TCPA private right of action, there is good cause for the Commission to waive these defects to the extent the Commission does not find Merck was in substantial compliance with Sections 64.1200(a)(4)(iii) and (iv) of the rules.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s regulations does not apply to solicited faxes, or, alternatively, that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). At a minimum, the Commission could clarify that solicited faxes sent with effective opt-out notices do not violate the Rule or any other regulation promulgated by the Commission under the TCPA.

Finally, if the Commission declines to issue the requested declaratory rulings, the Commission should grant Merck a waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s rules under the circumstances described herein.

⁴¹ *Rath Microtech Complaint*, 16 FCC Rcd at 16713 & n.18, 16715.

Respectfully submitted,

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